

Response to LSUC Consultation paper: “Promoting better legal practices”

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Response to LSUC Consultation paper: “Promoting better legal practices”

COMPLIANCE-BASED ENTITY REGULATION TASK FORCE

by Dr Steven Vaughan, University of Birmingham, UK

“In the training that we’ve been given it’s always impressed on you that following the Code and knowing the situations that might arise and how you deal with them, you get a lot of training in that. When you start the job, I wouldn’t say it’s forgotten about, but it’s kind of put to one side and sometimes you might lose track of what the SRA requires you to do, but ultimately you still have that knowledge so I still know what’s expected of me, but perhaps it’s something that people need to be reminded of. And maybe that’s why sometimes people lose focus of it and perhaps the SRA should take more of a role in what we do, in terms of reminding us of what our duties are.” [CA5]

This paper is submitted by way of response to the LSUC January 2016 Consultation Paper, “Promoting better legal practices”. I am an associate professor in the Law School, University of Birmingham (UK), and a former corporate finance solicitor in the City of London. I am currently working on a three year project funded by the UK government. This project, *The Limits of Lawyers*, is concerned with the relationship between lawyers in large law firms and their clients. I have interviewed 135 solicitors, compliance officers and others from 30 top 100 UK law firms for this project. One of the themes in the interviews is the impact of regulatory reforms on law firms (including entity based and ‘outcomes focused’ regulation) introduced by the Solicitors Regulation Authority (SRA).

To précis that which follows, my research suggests that there have been unintended consequences in the move towards entity-based regulation of legal services in the UK. Through the introduction of a COLP (a compliance officer for legal practice), and entity level controls, my research shows that individual solicitors, and their firms, have insourced their professional obligations and place heavy reliance on the COLP to ‘do’ compliance for them (as a firm and as individuals). Individual practitioners showed a striking lack of awareness of the professional principles to which they are subject, and said that this deficit was (in part) due to their law firms having place teams of training and compliance specialists. As such, COLPs (and other compliance officers) become the holders of professionalism for the firms, which devalues and

depersonalizes the sense of individual responsibility of individual practitioners. We have termed this, “COLP’ing mechanisms.”

If the LUSC is to move towards entity based compliance regulation, and the introduction of a ‘designated practitioner’/‘responsible lawyer’ I would suggest (on the basis of my research) that the following is done

- have clear, separate codes of conduct/professional rules, some of which apply to individuals and some of which apply to firms/designated practitioners. The current SRA Handbook Code of Conduct is unified and applies, at the same time, to individuals and to firms. I would suggest that this blurring is one of the reasons that practitioners feel it is appropriate for them to have such a poor understanding of the regulatory requirements on them.
- make it clear, from the outset, that the introduction of compliance, entity based regulation is not intended, in any way, to reduce the individual principles to which individual practitioners are subject. This might be done via guidance, and/or via a communications strategy.
- require firms to require their lawyers to undertake mandatory annual training on their professional obligations. The new ‘continuing competence’ regime introduced by the SRA makes no prescription as to the topics that ‘competent’ solicitors should cover as part of their continuing professional development. My research shows that the majority of law firms focus their training on the Code of Conduct rules (e.g. money laundering, client acceptance, conflicts of interest) and far less on the Handbook principles (e.g. independence, integrity) which apply at all times to all solicitors.

UK Regulation of Large Law Firms

The regulatory field for lawyers in England & Wales is complex. There are 9 types of regulated professional providing reserved legal services, and 9 different legal services regulators.¹ The Solicitors Regulation Authority (SRA) is the body responsible for regulating solicitors in England & Wales. These 130,000 practising solicitors are found in over 10,000 law firms and over 6,000 private and public employers. My focus is on the top end of the ‘corporate hemisphere’. The SRA takes a three pronged approach to standard setting and principles in the context of lawyers’ ethics: (i) it sets out high level, mandatory “principles” at the front end of its Handbook; (ii) it gives a series of detailed, topic specific rules on conduct, in the second part of the Handbook; and (iii) it promulgates a ‘Competence Statement’ of qualified solicitors (which includes, among other things, ethical matters).²

The 10 high level “principles” are found at the very front of the SRA’s Handbook. These 10 are ‘mandatory’ and apply to all solicitors at all times. They cover a wide

¹ http://www.legalservicesboard.org.uk/can_we_help/approved_regulators/

² The SRA is also, of course, engaged in the discipline of solicitors, has an Ethics helpline etc

range of matters: the rule of law, the client's interests, independence, respecting the regulator, equality and diversity etc. These 10 principles are not ranked, and the SRA is clear that no one principle takes precedence. Instead, if the principles into conflict, the SRA Handbook sets out that the principle which best serves the 'public interest' is the way forward.³ As I have argued elsewhere, such use of 'the public interest' is practically meaningless.⁴ What is also important to keep in mind when we come to look at the data is that no where, at no point, does the SRA say in its Handbook (or, indeed, anywhere else) that the client's interests come first. They do not.

Further on in the SRA's Handbook, as part of a Code of Conduct and via incorporation of specific norms, are detailed conduct rules on matters including confidentiality, client acceptance, anti money laundering, conflicts of interest etc.⁵ The SRA says that the Principles, "define the fundamental ethical and professional standards that we expect of all firms and individuals when providing legal services" and that the Code, "illustrates the practical application of the Principles in particular contexts."⁶ In other work,⁷ I have shown that corporate lawyers cleave to, and know about, the Code of Conduct topic specific rules far more than they cleave to, or know about, the underlying, front end, 10 mandatory Principles in the Handbook. Such may be of significant concern in that the conduct rules are largely context and point-in-time specific, whereas the principles (in theory) apply at all times to everything a solicitor does.

The Legal Services Act 2007 requires that all entities wishing to provide reserved legal services to the public must be authorised (in addition to the solicitors practising inside them).⁸ This move was said to occur to allow the SRA, "to take a more proactive compliance-based approach and to support the transition to OFR [outcomes focused regulation]."⁹ In this way, the SRA is (in theory) able to take enforcement action against individuals, practices or both when breaches of the relevant standards occur. In terms of the balance between regulating individuals and regulating entities, the SRA says, "Whilst the regulation of individuals plays, and will continue to play, an important role in legal services regulation, the primary regulatory mechanism is now on the entities providing legal services."¹⁰ As we will come to show, this shift in regulatory focus has had unintended consequences of depersonalising the professionalism of individual practitioners.

³ SRA, 'The Handbook – Principles' (Version 15, 2015), para 2.2

⁴ See: http://epapers.bham.ac.uk/1990/1/cepler_working_paper_9_2015.pdf

⁵ The current SRA Handbook is more than 400 pages long. Despite this, the regulator says it takes an 'outcomes focused' approach to regulation. The length of the Handbook is under review as part of a wider review of how the SRA regulates solicitors. See: XXX

⁶ <http://www.sra.org.uk/sra/consultations/OFR-handbook-May.page>

⁷ Steven Vaughan and Emma Oakley, 'The Gorilla Exceptions and the Ethically Apathetic Corporate Lawyer' (2016) 19(2) Legal Ethics (forthcoming)

⁸ See s.9 Administration of Justice Act 1985 (AJA) as amended by the LSA

⁹ <http://www.lawsociety.org.uk/support-services/advice/practice-notes/entity-based-regulation/>

¹⁰ SRA, 'Ministry of Justice – Call for evidence on the regulation of legal services in England and Wales' (Solicitors Regulation Authority, September 2013) para 4.7

Rule 8.5(b)(ii) of the SRA Authorisation Rules 2011 (part of the SRA Handbook) requires that every authorised entity must have someone nominated as a Compliance Officer for Legal Practice (COLP).¹¹ The COLP is required to take all reasonable steps to ensure compliance by the entity, and the regulated individuals within it, with its obligations, and to report various breaches of the obligations to the SRA.¹² In the guidance to the rules, the SRA says that,

“The roles of COLP and COFA are a fundamental part of a firm's compliance and governance arrangements... The existence of compliance officers in a firm and the requirements on them to ensure that the firm, as well as its managers and employees, are complying with the regulatory arrangements (COLP) and the SRA Accounts Rules (COFA) is not a substitute for the firm's and managers' responsibilities and their obligations to comply with Rule 8.1 (Regulatory compliance).”¹³

Equally, Outcome O(10.12) of the Code of Conduct, which links to Principle 7 of the Handbook, sets out that a solicitor and firm should, “not attempt to abrogate to any third party [their] regulatory responsibilities in the Handbook.” Thus, the clear intention of the SRA was that the move to entity based regulation, and the introduction of the COLP, was not to act as a shedding of personal responsibility by individual solicitors of their regulatory obligations. However, as we will come to show, this is exactly what has happened.

Methodology

Empirical work on lawyers in large law firms is relatively low in volume.¹⁴ This is despite the fact that, in England & Wales, a fifth of all solicitors work for the largest City firms,¹⁵ and the turnover of just the top ten law firms accounts for more than a third of the turnover of the *entire* legal services sector.¹⁶ The lack of empirical work is also striking given the acceptance that corporations, as clients, pose the potential for greater societal harm than individuals and have “limited [ethical] motivations” in the form of aggressive pursuit of profits (and so the ethics of their lawyers might require close attention).¹⁷ As such, large firms represent a numerically significant, and socially economically important, but largely overlooked, site of study. What

¹¹ This was required for all entities as from October 2011, as part of a series of regulatory reforms in 2010 and 2011 by the SRA titled “The Architecture for Change” – see:

<http://www.sra.org.uk/sra/consultations/ofr-handbook-october.page>

¹² Rule 8.5(c), SRA Authorisation Rules 2011

¹³ SRA Handbook, SRA Authorisation Rules 2011, Guidance Notes, para (vi)

¹⁴ There is a relatively large body of empirical work on in-house lawyers. It is not, however, our intention for this piece to be comparative. For a review of this empirical work, and a comparison of private practice and in-house lawyers, see: Moorhead and Hinchly

¹⁵ Law Society, Annual Statistical Report 2014 (London) p11

¹⁶ See: <http://www.thelawyer.com/news/uk-200-2013/>; and Law Society, *Legal Services Forecasts* (Law Society 2014) 3

¹⁷ Stephen L Pepper, ‘Three Dichotomies in Lawyers’ Ethics (With Particular Attention to the Corporation as a Client)’ (2015) 28 *Georgetown Journal of Legal Ethics* 1069, 1131. See further: Judith A McMorrow & Luke M Scheuer, ‘The Moral Responsibility of the Corporate Lawyer’ (2010) 60 *Catholic University Law Review* 275, 277ff.

other qualitative work does exist on the ethics of lawyers in large English law firms is: (a) primarily focussed on litigation lawyers rather than corporate lawyers;¹⁸ and/or (b) small scale (for example, Moorhead and Hinchly interviewed 9 private practice lawyers in large firms for their project;¹⁹ and Griffiths-Baker undertook 17 interviews for her work on conflicts of interest in large firms).²⁰

This paper relates to interviews I have undertaken with 110 transactional lawyers, Compliance Officers for Legal Practice and others, from 30 top 100 law firms operating in the UK, as ranked by the trade publication *Legal Business*.²¹ All but two law firms in the top 100 were asked to participate.²² For convenience, we use the shorthand 'corporate lawyers' in the rest of this paper to cover the various flavours of transactional lawyer who took part (leveraged, structured, and project finance lawyers; financial services lawyers; public and private mergers and acquisition lawyers etc) and to make clear that our focus is on lawyers in large corporate law firms.²³

Interviews took place between December 2014 and September 2015, either in person (at the lawyer's office) or over the telephone, and lasted between 30 and 61 minutes. The majority were over 50 minutes long. Interview schedules provided a series of themes and questions to be explored in a semi-structured dialogue

¹⁸ See, for example: Kimberly Kirkland, 'Ethics in Large Law Firms: The Principle of Pragmatism' University of Memphis Law Review 631 (here, of 22 lawyers interviewed, 17 were litigators); and Frenkel, Douglas N. "Ethics: Beyond the Rules--Questions and Possible Responses." *Fordham L. Rev.* 67 (1998): 875 (interviews with 19 litigators in large firms).

¹⁹ Richard Moorhead and Victoria Hinchly, 'Professional Minimalism? The Ethical Consciousness of Commercial Lawyers' Vol 42 Journal of Law and Society, 3 (2015)

²⁰ Janine Griffiths-Baker – it is not clear, from the Methodology appendix to this work, as to the practice area of those who took part in Griffiths-Baker's interviews. There are, of course, much larger bodies of qualitative empirical work on lawyers in other practice settings that also consider legal ethics. For example, in the mid-1960s, Jerome Carlin undertook more than 800 interviews with a cross section of lawyers in New York City on lawyers' ethics – see: JEROME E. CARLIN. 1966. *Lawyers' Ethics: A Survey of the New York City Bar*. New York: Russell Sage Foundation. Pp. xxix + 267. A decade later, John Heinz and Edward Laumann interviewed more than 700 lawyers for their study of the Chicago Bar – see: Heinz, John P., and Edward O. Laumann. [1982] 1994. *Chicago Lawyers: The Social Structure of the Bar*. rev. ed. Evanston, IL: Northwestern University Press. More recently, in their study of 106 Canadian corporate lawyers, Ronit Dinovitzer, Hugh Gunz and Sally Gunz explored complex and nuanced, direct and indirect, examples of 'client capture' (in which corporate lawyers became in a variety of ways beholden to their clients), but their direct engagement with how such capture impacts on lawyers' ethics was rather thin – see: Ronit Dinovitzer, Hugh Gunz and Sally Gunz, 'Unpacking client capture: evidence from corporate law firms' (2014a) 1 Journal of Professions and Organization 99; Ronit Dinovitzer, Hugh Gunz and Sally Gunz, 'Reconsidering Lawyer Autonomy: The Nexus Between Firm, Lawyer, and Client in Large Commercial Practice' (2014b) 51(3) American Business Law Journal 661

²¹ <http://www.legalbusiness.co.uk/index.php/analysis/4615-lb100-2015>

²² The two that were not asked do not do any transactional work.

²³ When firms were contacted, we set out that our preference was to speak with lawyers in the firm's corporate and finance teams. Different firms sourced interviewees differently, and forwarded on our call for participation differently. In some firms, for example, real estate lawyers who did primarily transactional work also came forward. Everyone we spoke with engaged in transactional work. In total, we spoke with 23 partners, 2 of counsel, 29 associates, and 3 trainee solicitors.

between interviewer and interviewee.²⁴ Once completed, the interviews were professionally transcribed, coded and analysed. Below, we use anonymised identifiers below to show the range of interviews from which we draw.²⁵

FINDINGS

Knowledge of The Handbook

We were interested in the extent to which regulation by the SRA impacted on the day-to-day lives of practising solicitors. What quickly became clear was that while these solicitors might have some specific (limited) knowledge of particular rules in the Code of Conduct (for example, on money laundering), in general their knowledge of the Handbook was very poor.

“No. oh god, no. I’d be really rusty if you gave me a test on that [the Handbook], I really would.” [CA7]

“The fact that I’d forgotten that there was that duty to the court probably says everything.” [CA6]

Even where firms had made efforts to ensure that the Handbook Principles were known by the firm’s solicitors, these efforts appeared to have had little impact.

I “The front of the handbook has these ten principles that we all live by...

R Yeah, I do have that on my wall. ((laughter))

I You have that as a personal thing or you have that because it was left on your desk?

R They left it on our desks. I think they left it on everyone’s desks when it [the Handbook] changed. They left it on our desks. And at that point I stuck it on the door of our little thing where we put our coats, and it’s been there ever since. I can’t tell you I’ve read it though recently, ((laughs)), which is bad. [FA8]

In particular, we focused on the extent to which those we interviewed understood the 10 Principles that sit at the front of the Handbook and which apply to everything that a solicitor does. Our aim was not, per se, to test interviewees on their knowledge of the 10 Principles, but rather to explore with them how good they thought their understanding was. Few felt confident they knew all of the Principles:

“I would like to think I would at least be 50 – 60% of the way there but I wouldn’t say that I would be able to come out with 100% - knockout scores.” [CP5]

²⁴ Schedules available on request.

²⁵ The markers are made up of three parts: first, C or F (Corporate or Finance); then P, C, A or T (Partner, Counsel, Associate, or Trainee); and then a number. So CP2 is the second Corporate partner we spoke with, and FA7 is the seventh Finance associate.

- “I And the front of the handbook there’s ten professional principles that we all have to comply with. I’m not going to, but if I gave you a test on those ten, how well do you think you’d do?”
- R What, if you said, “Write down as many as you know”?
- I Yeah.
- R Oh probably four.
- I And do you have a sense if any of them takes precedence over the other?
- R I know that some do, but I couldn’t tell you off the top of my head which do.” [FA9]

A number reflected that their lack of knowledge of the Handbook Principles was “embarrassing” [CA21]. As set out above, the SRA Handbook says that where two or more Principles come into conflict, that which best serves the public interest is that which takes precedence. This tie-breaker came as a surprise to many of those we interviewed and only one interviewee (a trainee solicitor) out of the 110 we interviewed raised this public interest test with us unprompted.

“I guess I must confess I could not have told you that [public interest] provision of the solicitor’s Handbook off the top of my head.” [FA2]

“I didn’t know it existed. I certainly should have done but I didn’t.” [CP19]

“I wouldn’t have, unless I was prompted I wouldn’t have necessarily remembered that” [CA21]

A number of interviewees challenged us, suggesting that, instead, the client’s interest was that which took precedence. They were wrong. This reflects, as we have shown in other work,²⁶ the strongly client-centred, client-first approach taken by corporate lawyers.

“I would have thought the overriding priority should be the client, the client over your own principles or profit, the client’s interests in that particular case, not the public interest.” [CP13]

When asked when was the last time the individual lawyers we spoke with had themselves gone back to the SRA Handbook the vast majority of answers fell on a spectrum between “Never!” [CP13] to several years ago. A number said that they “can’t remember” [CA16].

“I’m probably not in a minority here, or I hope I’m not, but never. I can’t remember when I’ve ever picked it up.” [FA3]

The only times interviewees could tell us exactly when they had last looked at the Handbook linked to very specific instances. This partner turned to the Handbook

²⁶ Vaughan and Oakley (2016) (see above)

when accused of being in breach of it, and others (a handful of the 110 interviewees) had done the same when faced with very fact specific queries on matters:

“I could almost give you the date. It was around about May or June last year when a partner at another firm accused me of acting in breach of the conduct rules and I knew I hadn’t but I needed to have the right reference at hand to persuade him of that fact.” [CP18]

Why then is this case? Why do solicitors in large law firms not regularly check the Handbook which sets out the regulatory framework for everything that they do as professionals? As set out below, we suggest that this occurs for two reasons: (i) professionalism has been insourced in large law firms to COLPs, compliance teams and education teams; and (ii) there is a widely accepted view (erroneous in our minds) that the Handbook is common sense and that professional conduct issues are so obvious that direct reference back to the Handbook is not necessary.

Insourced Professionalism

As law firms have grown in size, so too have their compliance departments. This is prompted both the regulatory drivers in the Legal Services Act 2007 (the move towards entity based regulation and the introduction of COLPs) and by an increasingly sophisticated approach towards risk management by firms.²⁷ The large firms also have significant education and development teams for their lawyers, and professional support lawyers who act as an internal academic for their teams.

Our research suggests that these teams, and the orientation of firms towards compliance through the medium of the COLP, have reduced the individual sense of responsibility of individual solicitors and the knowledge those lawyers have of their professional responsibilities. As this Corporate associate puts it, there are “people who take care of certain things” (like compliance with professional regulation) so the individual lawyer does not have to worry about them:

“I think I do rely on the firm's internal procedures and also infrastructure, because I think quite luckily working in a large firm there are people who take care of certain things like making sure you have all the right training that you're supposed to have.” [CA14]

We were struck by a divide between the partners and associates we spoke with. When we asked the partners why they did not regularly refer to the SRA Handbook for themselves, they said that they would (instead) contact the firm’s COLP for advice. The associates, on the other hand, were far more likely to speak about drawing on training by the firm on the Handbook as their reason why they did not refer to the rules themselves. Indeed, it was clear that a number of associates had no real idea about the COLP as a regulatory role holder:

²⁷ Jonathan Kembery, ‘The Lawyer’s Lawyer’ (2016) 19(1) *Legal Ethics forthcoming*

“There’s someone... there’s one person allocated to kind of look at the SRA requirements and... you know, overall, like, you know, making sure all of us go to enough of the training and... and kind of... yeah, I suppose all the admin stuff related to that.” [CA16]

Time and time again, the partners we spoke with framed their knowledge of the Handbook, and how it applied to their practices, in terms of the COLP.

I When do you think the last time was that you picked up or went online to look at the SRA Handbook?

R Whenever [the COLP] told me to! We're steeped in ethics, if you like, and we do, we get regular training on it. So, do I feel that I need to actually pick it up and re-read it every week? No, I don't. Do I look at it if I think 'Oh, I've got a difficult conflict issue.'? Probably. But I'm also equally likely to pick up the phone to [the COLP] and say 'Let's have a chat about this.' So, we're very lucky, we have a first-class compliance team here.” [CP17]

Some of the partners clearly saw their COLPs as oracles to whom they would turn for answers. This is, for sure, not how the role of the COLP is framed by the SRA. Having one pin point person seen as both responsible for compliance of a firm of thousands of lawyers, and a fount of all regulatory knowledge, may well be a burden too much to bear by many COLPs. This perhaps suggests that the balance of law firm regulation (between entities and individuals) has swung too far towards the entity end of the see-saw.

“Actually one of the good disciplines that [the COLP] has brought is that she clearly is enormously familiar with the rules so when we are having the more difficult debates she gets involved in about conflict or information barriers or whatever it might be. She is able to sort of bring us back to the rules.” [CP14]

“Why would I want to go out on a limb on this point when if I'm wrong there's all sorts of criticism that can come from it? It's not exactly a hardship to go and talk to one of two people who are both very helpful and whose purpose is to be there for this kind of question.” [FP2]

The idea of the COLP as someone inside a firm who can help “bring [partners] back to the rules” may be concerning for the situations in which partners do not turn to their COLPs for advice. For example, one partner spoke about the COLP and the compliance team as an “awful lot of people who are ultimately cost centres” [CP3].

“I would tend to pick up the phone to [the COLP] and I mean, if it was, sometimes, if it was some tricky conflict point, yes, I think you wouldn't want to have a discussion without having the thing in front of you as it were. But a lot of the time it's, particularly now we've got a more formulised in-house legal team, which is the sort of irony now because we have our own in-house

team led by [the COLP]. I would ring them up as much maybe, maybe they just indulge me by not telling me to just look it up yourself.” [CP15]

“To the extent that I ever do have concerns my first port of call would always be our director of risk. So one of the benefits of being in a large firm is that we have a small team who are focused on risk and who are able to provide good advice and keep up-to-date on what the issues might be, so I would always go to them first.” [CP19]

Few interviewees reflected on the fact that, despite the existence of the COLP, they continued to have personal responsibility under the Handbook for their actions. This Corporate partner and associate were notable exceptions:

“We’ve got a very good Compliance Department and I do talk to them often if I’m worried about anything, or checking anything, but I trust them to do that for us and they are very good. I know it’s my personal responsibility, but I feel very comforted by them... I like that we pay a team to train us and to think about the issues and to liaise with the SRA about policy decisions. I think that’s money well spent and it’s absolutely necessary that we have a really high quality Compliance team.” [CP13]

“We tend to think... I think we were right to assume that they [the compliance team] will keep us right in that sense, but we need to understand what our obligations are as well.” [CA17]

For the associates, they were comfortable that they were in compliance with the SRA Handbook either because they had had training by the firm on the Handbook and/or because they followed the firm’s internal procedures.

“In my mind it’s only when you get into difficult situations where you may have problems with acting for or Chinese walls or whatever the term is now, within your team, acting for the same people but on different aspects of the deal; you might want to check it then to see what the rules are. ((Laughs)) I can’t say I have, because we just tend to follow our internal procedures of making sure things are locked up from each other.” [FA7]

“We’re very clear where our policies are, internal reporting lines and things like that. So my first step would always be to go to that rather than any sort of handbook.” [FA3]

“I suppose part of it is you think, “I’m working in this highly regulated environment, somebody must have thought of this. Somebody must have read this before me. Somebody must have put these procedures in place.”” [FC1]

Following internal procedures may make perfect sense where the law firm’s internal procedures align with the SRA Handbook. But what comfort does the regulator have that this is the case? Such depends on supervision and enforcement by the SRA, and

also (we would argue) on individual lawyers having sufficient knowledge of the Handbook to be able to spot when something is out of line in their own internal procedures.

“To be honest with you, I never do that [look at the Handbook], which is probably a failure on my part. I think probably in the very early days, when I was a trainee, I used to have the Handbook on my desk because you are just generally quite panicky about things and quite self-conscious about everything you did, and so I used to do that but now I generally know what the rules are, I know what the red lines are – and we have periodic training sessions internally on that sort of thing – but it’s not something I do regularly, to be honest with you.” [FA5]

In the context of training, many of the associates told us that they receive training on the Handbook and “rely” on the firm to give them the training that is needed:

“I think because you do have ethics and compliance training and I suppose the major ethics and compliance points I would expect to be covered in that training. So I’d hope you’d already know how to deal with them.” [FC1]

“I think I physically going back to the handbook very little, because we have quite a lot of training here.” [FA4]

“That’s not to say I’m not aware of what’s in the handbook and I probably would be served well by going to it now and again just to keep my knowledge up to date. But we do get training on it and I was probably a bit disingenuous to myself because I have been on training sessions quite recently where the handbook is mentioned and we look at changes to the handbook. And that does come up probably every nine months to a year kind of thing I get a refresher on it.” [FA9]

Training is, in and of itself, in no way objectionable. However, our other work has shown that this training, when it does occur, tends to be on the ‘rules’ in the Handbook (client acceptance, money laundering, conflicts etc) and only very rarely on the Principles and/or on wider ethical issues.²⁸ It was clear that the associates placed faith in the firm to deliver to them the training they needed to be in line with their obligations. Without wishing to belabour the point, this insourcing of professionalism has the potential to devalue, demote and demphasise the individual responsibility that individual practitioners should feel:

“I assume that what they’re doing... there are a lot of training events and compulsory training sessions and stuff like that, so I assume that’s what needs to be done.” [FA8]

“I think most of us here would say they rely on the high quality training that [the COLP] and his team delivers.” [CP12]

²⁸ Vaughan and Oakley (2016) (see above)

Of course, the counter view may some have weight: that large law firms engage (and pay significant sums) to experts in compliance to be able to distil a complex regulatory rulebook into a format that is accessible to all the lawyers of the firm, and to act as an oracle to those seeking advice on that rulebook. I take this point. However, such centrally located expertise should not also work to allow individual lawyers off the hook for their own professional responsibilities. This Corporate partner told us it had been “years” since he himself had looked at the Handbook. When we asked why this might be the case, he went on to say:

“I think because partly because I find the rules quite impenetrable I think and partly a sort of lack of familiarity; I don’t know if other people would feel the same. But it’s that sort of fear of opening what you think might be Pandora’s Box. And also partly I think it is sort of the other side of the coin of lack of familiarity; we have a lot of familiarity with what we do here, how the business runs, and so decisions as to what is sort of ethical for example or isn’t a reason to conflict, often get taken sort of osmotically if you like. We sort of, we will know what it is. We will know a conflict when we see it.” [CP14]

The fact that a partner in one of the world’s largest law firms frames the professional rulebook that applies to everything he does as “Pandora’s Box” should be of grave concern: to the lawyer; to his firm; and to the regulator. What is also of concern is that “lack of familiarity” is used to justify, somewhat paradoxically, being unfamiliar with the rules.

Professional Regulation as Common Sense

The other strong push back from our interviewees – as to why they did not regularly refer to the SRA Handbook – was that such was not necessary.

“I think in my mind it’s all quite common sense the [Handbook] rules.” [FA7]

“A lot of it’s common sense, though, I think.” [CA16]

A number of interviewees described the Handbook as “common sense”, others said the principles and rules “are quite instinctive” [FA1] or “sensible” [FA8]. A smaller group were of the view that knowledge of the Handbook was linked to the ethics of individual practitioners (who, being ethical, did not need to refer to the Handbook):

“I wonder if that is because we take it for granted that it’s all built in; so we don’t go back to the rule book very often.” [CA18]

We are concerned by these views. First, much of the Handbook is not common sense. For example, Principle 3, the requirement to act with independence, may oblige lawyers to act to their own financial detriment and against their own best

interests.²⁹ Second, a number of the rules have nothing to do with instinct and are instead bizarre, complex creatures born of expediency for reasons lost in the mists of time. Just look, for example, at what the Handbook says does and does not count as “client money” and then ask oneself whether anyone (anywhere, at any point in time) could have come to the same answer by “instinct”.³⁰

Linked to “instinct” were a number of responses that linked to a “sniff test”. Here, the idea put forward is that there was no need to refer to the Handbook because if something smelled ‘bad’, the only lawyer who would look at the Handbook would be the one trying to find some rule (or some give in some rule) to do the ‘bad’ thing (and other, better, more ethical lawyers would simply walk away).

I “What about regulation? When do you think the last time was that you personally went back to the SRA handbook to look something up?

R Ten years or more ago.

I Why is that? Why is it not an active part of your practice?

R It's not an active issue. If I had a question I'd go to [the COLP] anyway. I wouldn't go to the source materials directly. As I'm sure you know, [the COLP] also has a colleague called [XXX] who is also very good at that kind of stuff. What do we care about day in day out? Conflicts management, information barriers. That's about it really. Don't need to go back to the rule book to know when you're close to the line. If you are close to the line, you don't want to be interpreting the rule book yourself when you can go back through somebody whose job is to deal with these issues day in day out.” [FP2]

“A lot of things are smell test: you wouldn't do that, you would do x. And if you are in a tight position and you say, ‘Hm, that's debatable; let me go back and check’ then you would.” [FA8]

There was also the notion that lawyers, being ‘good’ people, would not need to refer to the Handbook to direct their conduct:

“It's quite an interesting one, why have I not read the Code of Conduct for quite a long time? I'm not sure I've got a satisfactory answer to it to be honest apart from you almost feel as if you know what the right thing is to be doing. And if it's a little bit dodgy, if you don't feel entirely 100 per cent about it, you feel it might be not quite correct then you shouldn't be doing it, I would suggest.” [FC1]

²⁹ See the discussion of the associated case law in: Claire Coe and Steven Vaughan, ‘Independence, Representation and Risk’ (SRA, 2015) - <https://www.sra.org.uk/sra/how-we-work/reports/independence-report.page>

³⁰ <http://www.sra.org.uk/solicitors/handbook/accountsrules/part4/content.page>

“But it’s the fact that in a firm like this, I’m sure most of the ones you’re talking to, you’re just absolutely confident that everything is done by the book and that they will let you know what it is you need to be aware of.” [FA7]

This approach places a heavy burden on law firms to ensure they are hiring, retaining and promoting the ‘right’ people. However, our other work has shown that firms lack the ethical infrastructures to be confident of these matters.³¹ What also confused us was an open acknowledgement by the interviews that it may have been years (and years) since they last looked at the Handbook, but an equally strong push back they still had a “fair handle” on what the Handbook said and/or that the Handbook was just a “framework” for how they operated (which is, as a matter of law, a wrong conclusion to come to):

“It might not be that I would in every circumstance go and read the handbook. I like to think that I have a fair handle on what the main points of that are.” [CA14]

“I If I gave you – I’m not going to – but if I gave a test on the professional principles and handbook how well do you think you might do on that?

R ((Laughter)) I think that I would do relatively well on the general messages; perhaps less well on the specifics. But I think that that ought not be too much of a concern. I think the thing that people need a framework in which to operate for – and obviously we would not get anything done if we were looking at the SRA handbook every day. I think what is important is that you know what the aims are and what the framework is. I think most lawyers would be able to express that quite well.” [FA7]

³¹ Vaughan and Oakley (2016) (see above)